

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-1402, 75-1418, 75-1441

To be Argued by
JOSEPH I. STONE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

JAMES WESERLY CARTER, a/k/a
Bernard Lee,

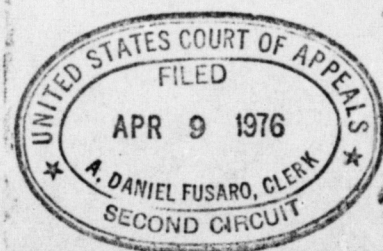
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR DEFENDANT-APPELLANT
JAMES WESERLY CARTER

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-v- :

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-----X

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

Defendant-appellant, James Weserly Carter, a/k/a Bernard Lee, appeals from a judgment of the United States District Court, Eastern District of New York, convicting him (and eight others) after trial with a jury before Hon. Jacob Mishler, Chief Judge, Eastern District of New York, of the crimes of conspiracy to violate the narcotic laws, Title 21, U.S. Code, Section 846, et. al. The defendant was sentenced to fifteen years imprisonment by Judge Mishler on December 5, 1975, said sentence to run concurrently with two other sentences the defendant is now serving. Bail is considered moot because of his incarceration on the prior case. The undersigned was

designated his attorney pursuant to the Criminal Justice Act by order of Judge Mishler on March 19, 1975, and no application was made to the Court of Appeals to be relieved. A notice of appeal was filed on December 5, 1975, pursuant to the wishes of the defendant, Carter.

STATEMENT OF FACTS

While lawyers continue to research cases and present them to Appellate Courts for review, it becomes discouraging when similar facts and arguments are submitted and except for a change in characters the Courts treat most of the narcotic conspiracy cases as being fairly typical.

Every lawyer has claimed in the past, and will claim in the future, that the government has violated their respective clients' rights under the Multiple Conspiracy Doctrine which was condemned in *Kotteakos v. U.S.*, 328 U.S. 750, but seemingly exempt when it pertains to narcotics trials.

This case requires us to change the names of the defendants, to move to different bars in different cities. With the refinement of electronic devices and phone answering equipment, new dimensions are before the Courts which were not present in the *Stromberg* and *Bentvena* cases of the 1950's.

The defendant-appellant, Carter, respectfully adopts all arguments made by all counsel for their respective defendant-appellants and accordingly, indicates his willingness to accept a reversal of his conviction.

Carter's conviction is largely based on the evidence. The evidence consisted of the testimony of Norman Lee Coleman, conceded by the government not to be a choir boy. He testified that he had many narcotic dealings with Carter in 1969, 1970, and 1971, and in 1972, after he became an informer (persuaded by an arrest and possible incarceration,) Coleman engaged Carter in a conversation wearing a Kel-Set recorder. The Kel-Set was worn on June 5th and August 22nd, 1972.

It was argued on behalf of Carter that Coleman and the D.E.A. agents who supervised the Kel-Set recordings knew that Carter was under indictment in the Maryland State Courts for a narcotic violation, that he had an attorney and any attempt to interview him or bring him within another conspiracy by use of an informer and recording device was in reality a violation of his Fifth Amendment Rights as set forth in *Messiah v. U.S.*, 377 U.S. 207, (1703-1710R) (1839).

To aggravate the Fifth Amendment rights even further, one of the federal agents gratuitously testified that he heard Carter's voice in Court on a prior occasion when Carter was in Court as a defendant in a narcotics case. A mis-trial was applied for and denied, (1806-1809).

In essence and after carefully reviewing almost 7,000 pages of testimony, the two issues that should be decided by this Court on behalf of Carter concern his argument under the Messiah Doctrine and whether or not a mention of a prior narcotics arrest deprived him of a fair trial.

QUESTIONS PRESENTED

1. WERE THE KEL-SET RECORDINGS PROPER UNDER MESSIAH
v. U.S., SUPRA?
2. WAS THE DEFENDANT DENIED A FAIR TRIAL?
3. WOULD THIS COURT LIKE TO REVERSE ON THE ARGUMENTS
PUT FORTH BY OTHER ATTORNEYS?

ARGUMENT

POINT I

In the case at bar, Carter was considered a co-conspirator with Coleman. A careful review of the testimony as outlined on page 1703-1710, when Agent Nelson testified, indicates very clearly that Nelson was aware that Carter had a pending criminal case on June 5, 1972:

"BY MR. STONE:

Q When did you first find out about Mr. Carter's prior criminal record?

A Probably as early as 1970.

Q And were you aware that Mr. Carter had pending criminal cases on June 5, 1972?

A Does that include all locations?

Q Any criminal cases --

THE COURT: I will count that as one question.

A I may have had some indication, but I didn't have any actual knowledge that he was under indictment or was going to be prosecuted.

Q Prior to June 5, 1972, had you obtained his mug shots and criminal record from the City of Baltimore?

A That was in the possession of agents in the office, yes. I may not have gotten it personally.

Q Did that reveal any pending criminal cases?

A I do not recall. It could have.

Q Did you ever discuss his pending criminal cases with Mr. Coleman?

A I really couldn't answer that. I may have. I don't know.

Q The answer is maybe?

A I said I may have. I don't recall.

MR. STONE: May I ask one more question?

THE COURT: That is seven --

MR. STONE: Six.

THE COURT: All right.

Q Did you know whether he had a lawyer representing him at that time in any criminal case?

A I really couldn't answer. I do not know whether he had or hadn't, whether he had a lawyer or he was a client of someone. I don't know.

THE COURT: If your client is convicted, I hope you have a backup point.

I do not think Messiah applies at all."

Agent Candell, in a voir dire examination to further the Messiah point, indicated that he was aware that Mr. Carter was a defendant prior to August 22, 1972:

"VOIR DIRE EXAMINATION

BY MR. STONE:

Q Was he the defendant?

A Yes.

Q And you know he was the defendant at that time?

A Yes.

Q And this was prior to August 22nd, 1972?

A I believe so.

Q And did you know he had a lawyer at that time?

A I assume he must have.

Q Did you talk to the prosecuting attorney in that court case concerning Mr. Carter?

A No.

Q Did Mr. Coleman know he had a lawyer at that time?

A I don't know.

Q Did he know he had a Court case pending at that time?

A I don't know.

Q How long before August 22nd was this?

A I really don't know.

Q Was it a week, two weeks, a month?

A Longer than that. It was a fairly substantial length of time. It was sometime between September of 1970 and August of 1972.

THE COURT: How did you happen to be in the courtroom?

THE WITNESS: I was in the courthouse on business entirely unrelated to Mr. Carter.

THE COURT: Did Mr. Carter testify?

THE WITNESS: I didn't see him in the courtroom. I was in the court building and I was walking down the hallway and I believe Mr. Carter came out of the men's room.

THE COURT: Did you hear his voice?

THE WITNESS: Yes, I talked to him. I said, 'How you doing, Brother?'

And he said to me, "Gee, I have seen you around. What's your name?" And I told him and he said, "You work for the Feds?" or some such thing, and I said, "Yes, that's right," and a few moments of small talk and he went on his way and I went on mine.

Q Did you advise any of the other agents, Mr. Nelson or or Mr. Bradley, that you saw Mr. Carter in Court?

THE COURT: I did not know that this was a so-called Messiah hearing.

A If I had not immediately, I might have mentioned it to someone later that I happened to see James Carter in Court."

This case is similar to Messiah because not only did Coleman testify concerning the conversations he had with Carter with the use of a Kel-Set but Agents Nelson and Candell also testified as to what they heard on these Kel-Set recordings. Messiah applied to the identical case for which the defendant was indicted but in this

case, Carter was under indictment in a Maryland court for a narcotics violation, (he was subsequently convicted,) and a great deal of the evidence concerning Carter stemmed from his involvement with alleged Baltimore narcotic violators.

The agents involved here were federal agents., and we need only to quote what the Supreme Court stated in *Messiah*, *supra*, at page 1203:

"We hold that the petitioner was denied the basic protections of that guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

And the Court further stated,

"We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial."

POINT II

Agent Louis Candell, on direct examination by Mr. DePetrìs, was discussing the tape of June 5, 1972, and gratuitously answered the following: (at page 1805)

"A (Continuing) Mr. Coleman asked Mr. Carter, he said, "When are you going to be ready to do something" and as I said earlier, Mr. Carter didn't respond specifically to that question. He began to engage in a conversation about a pending narcotics case that he had against him in the state of Maryland --"

Immediately upon hearing this declaration, the judge excused the jury and a mistrial was applied for. The Court inquired as to whether or not the tape said "Narcotic case" and the United States Attorney admitted not hearing those words: (at page 1807)

"THE COURT: Does it say "narcotic case on the tape?

MR. DE PETRIS: I didn't hear it but he is testifying that this refreshed his recollection as to what was said.

THE COURT: Were you advised not to discuss the nature of the charge in the Baltimore case, the state case?

THE WITNESS: I don't remember having been so, your Honor.

MR. DE PETRIS: Your Honor, it was discussed with Agent Nelson and Agent Bradley and Agent Candell was in the room, all three were together when we were discussing what was not to be talked about.

I do not recall specifically saying it to him but I remember he was there and this was all discussed at the same time when the agents arrived yesterday or the day before. I don't recall which day.

THE COURT: I am going to deny the motion. I understand the significance of it all but I am going to deny the motion.

I will take any charge you want me to give the jury --

MR. STONE: I don't think any corrective charge can correct the situation. It would further accentuate it.

The whole purpose of your admonition and my questions at the beginning of the trial was to avoid the problem.

I believe you mentioned on at least two occasions to the United States Attorney, to please advise his agents.

I have been careful in getting certain questions to certain witnesses and I asked to have the jury excused. If I thought I would border on that type of question.

THE COURT: Your fondest hope was realized, nevertheless.

What have you got to say about it? It is a serious problem.

MR. DE PETRIS: Yes.

I think if your Honor would charge the jury to disregard that in view of the length of the trial and the amount of time and length of this trial, it would have little effect if any. I believe they will forget it.

THE COURT: I will believe it will have little effect too but on the record as it is, that he had a pending narcotics charge it appears to be serious error.

However, Mr. Stone says if I mention it it will just emphasize it. That's his position.

Of course, there has been testimony in the case that he was surveilled and followed to a courthouse.

You insist I say nothing about?

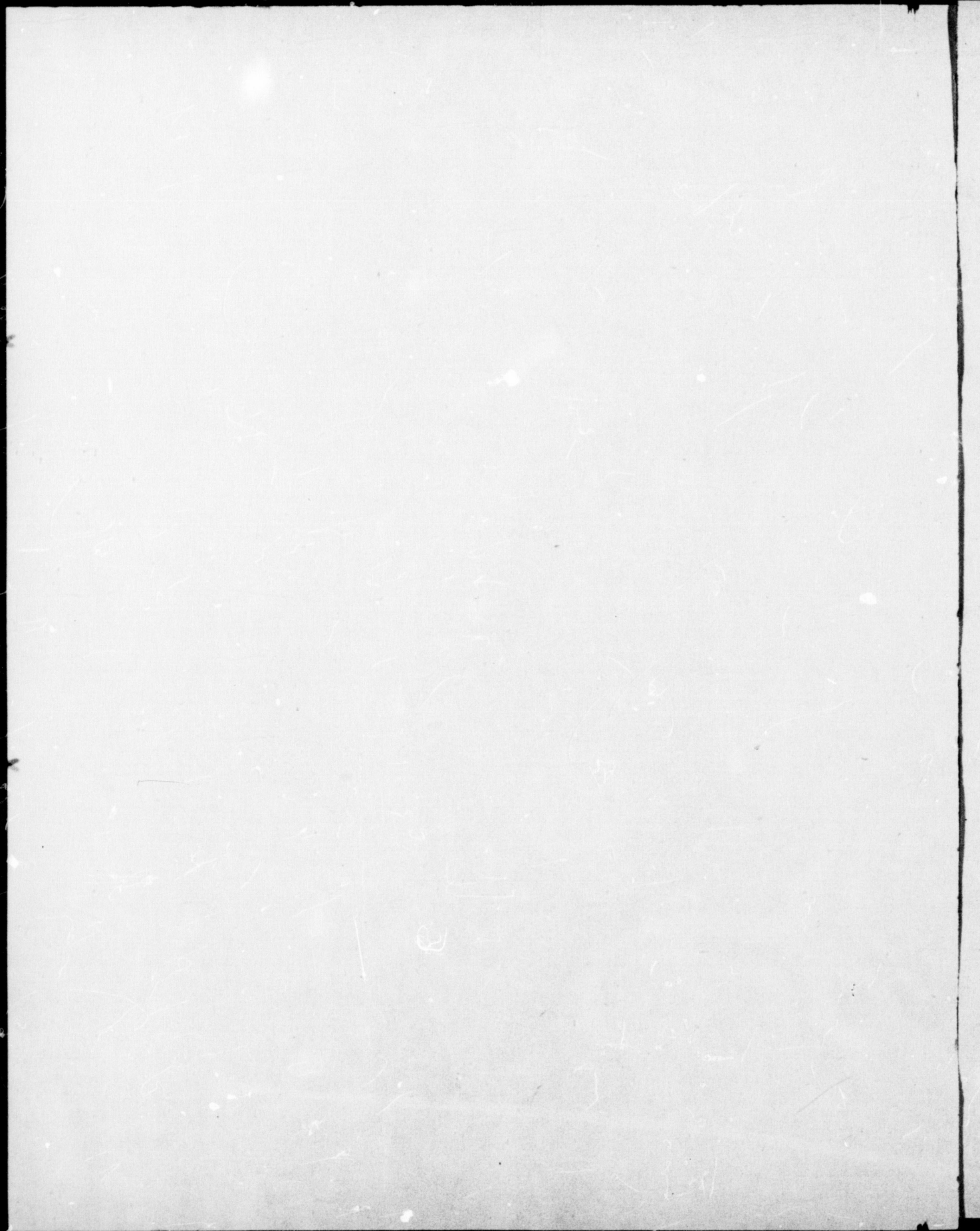
MR. STONE: I think it would accentuate it. I made my application.

THE COURT: Second choice. I am not about to let Mr. Carter out after this much of the trial and if the Court of Appeals, in the event of a conviction, finds it reversible error, let them do it.

MR. STONE: I have no second choice. That's the only application I make."

The Court offered to make a corrective instruction as shown above in the minutes but this was refused and although the trial at that time was only ten days old, the prejudice sunk into the jury's mind and they carried the fact that Carter had a prior narcotics case pending with them into their deliberations.

This was not harmless error and the Court, in the interests of justice, should reverse the conviction.



CONCLUSION

WHEREFORE, THIS COURT SHOULD CAREFULLY REVIEW
THE FACTS IN THIS CASE TO SEE WHETHER THEY CAME WITHIN
THE DOCTRINE OF MESSIAH V. U.S. , SUPRA; WHETHER OR NOT
DEFENDANT WAS AFFORDED A FAIR TRIAL BECAUSE OF THE
GRATUITOUS, UNCALLED FOR REMARKS OF A GOVERNMENT WITNESS
AND THE COURT SHOULD ORDER A REVERSAL OF THE CONVICTION
AND DISMISSAL OF THE INDICTMENT AND ACCEPT ALL OTHER
FACTS AS BEING SUBMITTED PURSUANT TO ANDERS V. CALIFORNIA,
386 U.S. 738.

Respectfully submitted,

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